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Supreme Court of the United States.

OCTOBER TERM, 1904.

No. ~~358~~ 89.

BRAINARD H. WARNER AND LOUIS D. WINE, TRUSTEES; FRANK L. FREEMAN, LAURA R. GRAY AND JAMES P. LOWE, APPELLANTS,

vs.

DAVID C. GRAYSON, TRUSTEE; MICHAEL SHEA, WILLIAM J. McCLURE, ET AL.

No. ~~359~~ 90.

H. MAURICE TALBOTT AND FRANK I. WOOD, APPELLANTS,

vs.

DAVID C. GRAYSON, TRUSTEE; MICHAEL SHEA, WILLIAM J. McGUIRE, ET AL.

BRIEF SUBMITTED ON BEHALF OF APPELLANTS, WOOD AND TALBOTT.

JOHN RIDOUT,
CHARLES F. CARUSI,
Attorneys for Wood and Talbott, Appellees in No. 358 and for Appellants in No. 359.

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BRIEF SUBMITTED ON BEHALF OF APPELLANTS, WOOD AND TALBOTT.

This is an appeal from the decisions of the Court of Appeals of the District of Columbia, rendered October 6th, 1903, and May 24th, 1904. The latter decision is a merely formal affirmance of a final and modified decree entered November 30th, 1903, in accordance with the mandate of the Court of Appeals of October 6th, 1903.

Assignment of Errors.

I. The Court erred in holding that the appellees are entitled to an easement for light and air over the land of the appellants.

II. The Court erred in leaving to the discretion of the trustees appointed by it the right to sell as a whole the land covered by the Victoria Flats and the adjoining land owned by the appellants.

The facts found in its opinion by the Court below to be either *material* or *proven* are few in number. Likewise in its opinion of October 6th, 1903, the Court of Appeals so correctly states the substance of the record in a way manifestly so fair to both parties that these appellants, were they assured that the learned counsel for the appellees would likewise refrain from attempting to go behind the findings of the Court of Appeals, would, without further preliminaries, address themselves to the several questions of law involved in the decisions of the lower court.

In default of this assurance, they make the following

Statement of Facts.

This case, it is believed, will turn principally, if not wholly, upon the propositions of law decided by the lower court. About the facts there is little or no room for controversy or dispute in the record, though counsel differ widely with respect to some of them in the briefs heretofore filed.

In view of this always regrettable circumstance, we will again endeavor not merely to state the facts with accuracy, but to verify each statement of any material fact or circumstance or inference by page reference to the record.

On the *13th day of January, 1897,* Alice S. Hill, who was the owner, conveyed in fee to Nicholas T. Haller, lots one and two, block forty-five, in Hill's subdivision, of middle grounds of Columbian University, fronting one hundred and fifty feet on 14th Street extended, and one hundred and ninety feet on Welling Place; on *January 22, 1897,* Haller executed a deed of trust to McReynolds and Merriwether to secure $12,000, part of the purchase money to said Hill; for convenience this trust will hereafter be referred to as the McReynolds Trust. It covered a front of 30 feet on 14th Street and 66 feet on Welling Place.

On the *22d day of January, 1897,* Haller executed a deed of trust to Warner and Wine to secure $75,000, represented by 118 notes to sundry persons; this trust will hereafter be referred to as the Warner Trust; it covered a front of 120 feet on 14th Street and of 124 feet on Welling Place. When these two trusts were executed and recorded there were *no improvements* of any kind upon the land. Haller then erected an apartment house known as the Victoria Flats. (Record, pp. 1 to 12.)

He had originally intended to locate it well within the lines of the Warner trust, but owing to a message from Mr. Justice Harlan, calling his attention to certain building restrictions in one of the prior deeds to the land, he changed the location so that the south and west lines of the building were practically coincident with the lines of Warner's Trust (Record, p. 47). Certain area ways on the first floor and porches on the upper floors on the south side project about 4 feet six inches beyond the line of the Warner trust.

There are windows in both the south and west sides looking out over the appellant's land, as described in the McReynold's Trust. There are also the usual recesses

for light and ventilation on the south and west sides of the building.

When the building was substantially completed, *in December, 1897,* Haller executed the deed of trust to Grayson and Heald, under which the appellees claim. The deed of trust was drawn up by Mr. John C. Heald, of the local bar, and signed by Haller. (Record, p. 43.) This will hereafter be designated as the Grayson Trust. This conveys by the *same description* as the Warner Trust. (Record, p. 174.)

This trust was given to secure material men who had contributed material to the erection of the building. Afterwards, for the purpose, as he expressed it, of "blanketing the thing up" (R., p. 20), Haller executed a trust to Sebring and Holt, purporting to secure $31,000 to McClure and Roome. This will be designated as the Sebring Trust. It was wholly without consideration.

THEREAFTER, and after the trust to the appellees, Wood purchased from Haller an undivided half interest in the Victoria Flats property, and an adjacent 10 feet on the south and west sides, paying therefor by conveying Wood's equity of redemption in certain Washington City real estate, valued at $20,000, *i. e.*, which netted Haller $20,000 in a subsequent trade. (Rec., p. 110.) It is true that the equity was subsequently wiped out by a foreclosure sale, but not until Haller had realized $20,000 by the exchange. (Rec., p. 110.) The Sebring trust was not executed at the instance nor with the knowledge of either Wood or Talbott, and when its existence was ascertained they insisted upon and procured its release (R., p. 67).

Wood discovered after his purchase, but before conveyance, that the building was located, as above stated, and when Haller made conveyance to Duke to hold as

trustee for him and Wood, the latter, for his protection, required the inclusion in the conveyance of ten feet additional on the south and west sides of the building (R., page 20). Thereafter Talbott purchased Haller's one-half interest in the building, and *Wood and Talbott purchased all Haller's interest in the adjoining vacant ground, each paying the price in money.* It was only because of said requirement that the 10-foot strip on the south and west sides of the Victoria was included in the deed from Haller to Duke. Wood required this for his own benefit; afterwards when Wood and Talbott had become owners of the whole property they caused the ten feet to be reunited to the vacant property.

Wood successfully conducted the hotel for a time, but appellants found that it would not be possible to meet the exorbitant charges of interest out of the revenue from the Victoria. They thereupon made inquiries to ascertain what could be done in the direction of refunding the debt. They ascertained that probably $100,000 at most could be borrowed (R., p. 29).

This made it imperative that some reduction should be made in the amount of existing encumbrances. Thereupon they made inquiries (called threats by the appellees) of the respective holders of notes under the Grayson trust, and while some were reasonable in their demands, the attitude of Grayson in demanding immediate payment of practically the whole of the notes held by him, defeated the plan of refunding the debts secured by the Warner and Grayson trusts. (R., p. 29.)

Thereafter interest on the Warner trust fell due, was not paid, and sale for that default was threatened. Wood and Talbott saw Grayson, who acted as the representative of those claiming under Grayson trust, and informed him that the funds in Wood's hands were not sufficient to pay the interest. Grayson demanded that

what Wood had should be paid to him (Grayson), but refused to say what disposition he would make of it if Warner refused to receive it. (R., p. 30.)

The notes secured by Warner trust, being 118 in number, it was not possible to make a partial payment on account of interest. Wood took advice of counsel, and was advised not to pay over any money unless assured it would be accepted and duly credited, and the threatened sale averted. Such an assurance could not be obtained.

Afterwards, having heard that Grayson was claiming for his trust certain easements over ten feet of the vacant land south and west of the Victoria, Wood and Talbott, by advice of counsel, in order to negative in the most public and emphatic manner the validity of such claim, filed the bill against Duke found in the record. Warner and Wine advertised the property for sale under their trust. (Record, p. 57.)

The bill in this cause was filed, an injunction against sale was granted and receiver appointed. From the latter action appeal was taken by Wood and Talbott, and the order was affirmed, the main questions being by the opinion expressly reserved. Answers were filed, proof was taken, and final decree was passed, which, as modified, adjudges in substance:

Brainard H. Warner, Frederick W. McReynolds and David C. Grayson are appointed trustees. They are authorized to sell the property *as a whole* or in parcels. In the latter case they are to offer as one parcel the Victoria Flats building, with an easement for light and air over a strip of land along the west and south sides thereof *ten feet in width.* They shall sell the residue in such parcels as they deem most advantageous, so far as necessary to pay what is due on the said trusts respectively, with costs of sale.

The *porches* which project over the adjoining land, and the *cement walk*, are apparently to be sold as part of the building. If there is any evidence establishing their *necessity* to the profitable conduct of the Flats, as distinguished from mere convenience, we concede that under Frizzel *v.* Murphy, the Court was justified in so much of the injunction as covered them.

The burden of showing this necessity is, however, upon the appellees, and they do not appear to have succeeded in carrying it.

Analysis of the Record.

Bacon has aptly said: "Truth comes easier out of error than out of confusion." Upon analyzing the bill, which, by a noteworthy *inversion* of the *chronological* order of events, makes out a case wholly unsupported by the proofs, the main reliance is seen to be placed:

(a) Upon a "known plan" to build the hotel or flats in such wise as to leave a ten-foot strip adjoining the south and west sides.

(b) An agreement by Haller *with* the appellees or *for their benefit* to obtain a release of a ten-foot strip for this purpose, the "known plan" becoming impracticable by some building regulation.

(c) The fraudulent behavior, "not to be characterized by an epithet" of the appellants, who had notice of the "known plan" and of the agreement by Haller with the appellees to give them ten feet additional; in that they secured the ten feet for their own use, that, instead of taking title directly in themselves, they made use of a tool, one Duke, who held the title for them under a declaration of trust, their fraudulent conduct in trying to buy up notes, making threats, and, in general, their obvious intention of making the appellees pay as high price as possible for the adjoining land.

1. The deed of trust to Grayson & Heald (under which appellees claim) was made *December 20th, 1897.* (Record, pp. 32, 33.)

Wod got his deed of the Flats property *July 31st, 1898.* (Record, p. 33.)

Wood got his deed of the ten-foot strip (created thus for the first time as a *separate* subject-matter of dispute) *March 13th, 1899.* (Record, p. 33.)

Talbott acquired his interest *April 1st, 1899.* (Record, p. 64.)

It thus appears that Wood became interested in the property in controversy after Grayson & Heald had their deed of trust, and Talbott became interested still later.

Whatever rights, whether to the land actually conveyed to them by the deeds of trust or to the adjoining land, either the holders under the first or second trusts can now have, must have been such as they acquired at the date of their respective deeds, or on account of previous facts which might have given rise to some equity in their favor. And in this connection it is immaterial whether they limit their claim to the corpus of land not covered by their deeds or to an easement over all or a portion of the adjoining land, or whether they claim an equity for the reformation of their deeds of trust, or for specific performance of an alleged agreement to grant an easement, no *Subsequent fact* can increase or diminish or otherwise affect their interest so created, or have any relevancy to this suit except as tending to prove or disprove the existence of some fact prior to said deeds of trust.

Now it is obvious that had Haller been guilty of these alleged fraudulent practices after December 20th, 1897, they would become material as *indicia* of a pre-existing scheme or plan or program on Haller's part by which he was to cheat his creditors.

But how Haller's *previous* conduct can be affected by his *grantee's* subsequent behavior is not apparent, unless they were in collusion. Now of this there is not even a suspicion in the record; counsel have never even hinted it in argument; the trial justice expressly "acquits" him of such misbehavior; and, the fact is, Haller, who is an architect and builder, and dependent upon material men and money-lenders for his livelihood, obviously has joined forces with his creditors against his grantees, furnished the former with documentary evidence of various kinds, and, in taking the stand in their behalf, has sworn to everything he conscientiously could swear to.

It must be quite evident, then, that all the events after December, 1897, including the alleged fraudulent practices of the appellants, are, as the Court of Appeals in its opinion has regarded them, of no materiality whatever.

2. Now as to the "known plan" to build the hotel or flats in such wise as to leave a ten-foot strip on the south and west sides.

Known to whom?

Certainly not to Warner & Wine, or their *cestui qui trustent.*

If so, their counsel was derelict in not putting them on the stand, a charge from which we freely acquit him.

Known to Grayson & Heald or their *cestui qui trustent?* Three witnesses were called upon this point. Mr. Grayson, one of the trustees and principal creditors, who testified that he had no knowledge whatever that the Victoria Flats building was not fully comprised within the ground specified in that deed, he "never had any suspicion or any intimation otherwise"; his understanding and belief was "that the entire ground belonged to Mr. Haller; and I did not know anything about the dimensions of the building at all." (Record, p. 35.)

Not a word about any "known plan" in Mr. Grayson's testimony.

Mr. John C. Heald, one of our well-known lawyers, the other trustee, and a creditor to the extent of ten thousand dollars, *prepared* the deed of trust of December 20th, 1897. Counsel was careful not to ask him anything about any "known plan," or what representations, if any, Haller or anyone else had made to him, nor what his "knowledge, suspicions, intimations and beliefs" were. (Record, pp. 43, 44.)

So much for the trustees themselves, and the one who prepared the trust.

Mr. Zellers, who was questioned in the same leading and suspiciously negative way, says: "We had not the least idea that the flats was on any other ground than what belonged to it," and, by belonging to it, he meant "the *plats* that was laid out to put the building on." (Record, pp. 41, 42.)

Still nothing about any "known plan" to have ten feet around the building. The plat Mr. Zellers refers to is difficult of identification, for, singularly enough, counsel forgot to offer it in evidence.

Mr. McClure, the last and the only witness who approximates in his testimony any "known plan," says:

> "Q. At the time you accepted these second trust notes what knowledge or information had you that the ground described in the second trust did not enclose all the ground that the Victoria Flats was built upon or extended over?
>
> "A. I always *understood* that there was ten feet of ground laid outside the building for an air space. I built the areaways there with the *understanding* that the building owned the ground.
>
> "Q. What was your understanding or belief that the deed of trust covered that ten feet?
>
> "A. I always understood that the deed of trust covered the ten feet front all around the building." (Record, pp. 40, 41.)

In this skeptical age Mr. McClure's faith is childlike and very beautiful, the more so that it was spontaneous and uncaused. He understood there was ten feet reserved, and that the deed of trust his attorney, Mr. John C. Heald, drew, covered it.

Why he understood he does not say; he is reticent about plans and plats, known or otherwise; and, above all, he, like every other of the appellees' witnesses, neglects to say that he was misled by Haller or by anyone else, or that he enjoyed anything more robust and positive than an absence "of understanding, suspicion, intimation or belief" about the coincidence of the wall of the flats and the boundary of the deed.

Mr. Haller was the man to clear up all these suspicious intimations and beliefs. His counsel, who called him as a witness, had only to ask him in his usual form:

> "Did you not show the original plans of your building to all or some of these appellants?
>
> "Did you not tell them you intended to reserve ten feet for an air space?
>
> "Did you not intimate that you intended them to have ten feet more ground than Warner & Wine had?
>
> "Did you not tell them that you had made arrangements to secure the release of ten feet to add to the building?"

A single affirmative reply, and the appellant's case was won, not for a mere easement, but the *corpus* of the whole ten feet that Justice Hagner gave them.

The learned counsel for the appellees asked Haller the one question, "Is that building located on the ground on which you intended it to be located when you first prepared the plans?" (Record, p. 47.)

Witness was not even asked what his plans, as first prepared, showed forth. Nor, most significant of all, were these plans offered in evidence.

So much, then, for the "known plan," which does not appear ever to have had any existence, nor to have been made known to anybody, and the only trace of which is to be found in the eloquent briefs and argument of counsel.

And now for the agreement between Haller and the appellees, by which, if they accepted this second trust, he was to secure for their benefit a release of a strip of ten feet on the south and west.

This agreement appears in the first place to have been made February 14th, 1898, two months after the appellants had their deed of trust. (Record, p. 112, f. 250.) How they could have been affected by it is, therefore, very puzzling unless their "beliefs" were retroactive as to time, as well as not precisely limited as to space.

The agreement was not with them at all. It was between Haller & MacReynolds, for the benefit of Early & Lampton's principals. (Record, p. 92, f. 209.) The "agreement" never was an *agreement.* It was an offer which was never accepted at all by *anybody* at *any time.*

It is evident, then, that the "agreement," the "known plan" and the behavior of the appellants, which, content with merely quoting the phrase every minute or two, counsel kindly refrain from "characterizing by an epithet," in modest emulation of the Court below on the appeal from the appointment of a receiver, when practically the only evidence before it was the bill of complaint, are not singly or collectively sufficient to make out any equity in favor of the appellees.

Whether the physical situation of the property at the time appellees took their deed, and about which there is no dispute, or whether the language of the deed of December 20th, 1897, about which there is also no dispute, entitles the appellees to an easement for light and air, are questions of law, pure and simple, and are dealt with in the following portions of this brief.

First, however, let us consider how far the evidence justified the Court below in refusing to reform the deed of trust on the ground of fraud or mutual mistake.

Point I.

A written instrument will not be reformed for mistake or fraud unless clear, positive and convincing evidence be produced showing the existence of such mistake or fraud.

Equity will reform a written contract or other instrument *inter vivos* only where, through mutual mistake, or the mistake of one of the parties, induced or accompanied by the fraud of the other, it does not, as written, truly express the agreement of the parties. But equity will not reform a written instrument unless the mistake is one made by *both* parties to the agreement, or where there is mistake on one side and *fraud* in the other party in taking advantage of that mistake and obtaining a contract with knowledge that the one dealing with him is in error in regard to what are its terms. We admit, subject to the rule requiring the evidence to be clear, positive and convincing, that if in the case of the Grayson trust, both Haller and Grayson intended that the trust should convey more ground than was covered by the description in the deed of trust, there would be an equity for the reformation of that deed of trust as against Haller, so as to include such additional ground as was mutually intended to be conveyed; or if there were any evidence, clear, positive and convincing, that Grayson expected to receive more ground than was covered by his deed of trust, but failed to do so owing to some fraud practiced upon him by Haller, that then, if notice were brought home to these appellants, they being privies in title, would be concluded.

But we submit that, so far from the evidence disclosing any mutual mistake, there is absolutely not a scintilla of such proof, and nowhere has the bill gone so far as to allege that Mr. Haller perpetrated, or attempted to perpetrate, any fraud upon either the Grayson or the Heald trust-holders, and the learned Justice below not only acquits Haller of any fraud, but confusing dates commends him (R., p. 141.) The only testimony taken in behalf of the complainants upon this point was that given by Haller, who was called as their witness, and testified (see R., p. 47) that he moved his building back in obedience to a message from Judge Harlan, notifying him of a building restriction in the Sherman deed of the property, and threatening him with an injunction if he did not re-locate his building.

It certainly cannot be contended, after the building had been once located in its present position, that Grayson and Heald, subsequently taking a deed of trust, were misled by the terms of their deed of trust. As a matter of fact, Mr. Grayson's deposition, which is typical, contains only this statement as to what he was led to believe and as to what he relied upon, outside of the terms of his written deed, *i. e.* (see Record, p. 35), he was led to believe that Haller "owned the adjoining property." As a matter of fact, Haller did at that time own the adjoining property; and, if important at all, Grayson's own testimony shows that he considered such ownership by Haller sufficient guaranty that the adjoining property would never be built upon, if he ever considered anything at all about it, which is highly doubtful. As a matter of fact, Haller, though he did then own the ground, afterwards sold it, a contingency which Mr. Grayson should have considered.

Parol evidence is admissible to show mutual mistake or fraud, as a basis for the reformation of a deed, even where the deed or other written instrument to be reformed is one

which the Statute of Frauds itself requires to be in writing. But, necessarily, the parol evidence by which it is sought to contradict or enlarge the express terms of a written deed of conveyance, which the law requires to be recorded, and of which subsequent purchasers are to take notice, must, to say the least, be reasonably clear and convincing. The law is thus stated by one of the more recent writers on the subject of equity:

> "An instrument will not be reformed on the ground of mistake unless the evidence shows clearly and satisfactorily not only that the writing does not truly express the intention of the parties, *but also what was intended to be expressed, or what the actual contract was.* The courts have stated the rule as to the degree of evidence required for the reformation of a contract in many different ways; but however the rule may be expressed, the evidence must be sufficiently cogent to thoroughly satisfy the mind of the Court that fraud has been committed, or that a mistake has been made. A court of equity, in correcting an agreement of parties upon the ground of mistake, proceeds upon the theory that it does not express their real sense, and so it is most evident; that the mutuality of the mistake must be made out, and the fact of a different agreement having been intended by both established by evidence which is clear and convincing." (See Eaton on Equity, p. 623, and cases cited.)

Argument on the Law.

The questions of law here involved are three in number; the two first deal with the existence of an easement for light and air in favor of the Appellees over the land of the Appellants, and the third deals with the propriety of the decree.

If the first two are answered adversely to the claims of the Appellees, the third becomes unimportant.

These first two questions, by which it is sought to ascertain whether the appellees have acquired an easement for light and air over the appellants' land in the only two ways known to the law, to wit, either by express grant or by implication of law based upon necessity, and the theory that one may not derogate from his own grant, may be thus stated:

1. Is there anything in the language of the deed of trust to Grayson & Wood, even when read in the light of surrounding circumstances, from which an intention to pass an easement of light and air over ten feet of the adjoining property may be inferred?

2. Can an easement for light and air be acquired in the District of Columbia in any other way than by deed of grant, *i. e.*, can it be acquired by mere implication from the physical relation of the land granted to the land reserved?

The Court of Appeals has answered both these questions in the affirmative. That the Court erred, the appellants will try to establish in the following points:

Point II.

No one can have a de facto or any other kind of easement in his *own* land, and there is nothing in the *language* of the deed of trust of December 20th, 1897, or in the attendant circumstances, from which any *intention* to convey more than the land described by metes and bounds and the improvements thereon can be gathered.

The argument of the learned Court below upon this point may, as gathered from the opinion, be thus summarized:

"In the deed of trust to Grayson and Heald the parcels of the two lots as described in the deed of trust to Warner and Wine are granted, 'together with all singular the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in any wise appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise, however, of the party of the first part, of, in, to, or out of the said land and premises."

(Opinion of Alvey, C. J., Record, p. 148.)

"And such being the right and power of Haller (owner in fee of both parcels), the mortgagor, over the divided parcels of the two lots, it was perfectly competent for him not only to make the second deed of trust of the parcel of ground upon which the Victoria Flat building had been erected, but to create and annex to that building a *de facto* easement for light and air, etc."

(Opinion, Record, p. 150.)

"But without deeming it necessary to apply the principle as thus broadly stated (out-and-out doctrine of easement of light and air by implication), the deed of trust to Grayson & Heald, by express terms, not only recognizes the existence *de facto*, but the user, of easements of ways, rights and privileges as appurtenant to the said building. This is the clear import of the deed of trust."

(Opinion, Record, p. 150.)

The use by the Court of the expression *de facto* easement is interesting. The Court holds that it is not necessary for it to hold ("to apply the principle as thus broadly stated") that the appellees acquired a *de jure* easement by *implication of law*, because Haller already had a *de facto* easement in his *own* land, and this the parties must have *intended* to pass under the head of "im-

provements, ways, easements, rights, privileges and appurtenances."

In the first place Haller could not in law have an easement in his own land. When a man walks over his side yard, for instance, it will hardly be said that he creates for himself or for anyone else a *de facto* right of way, nor if he opens a window overlooking his back yard does he create a *de facto* easement for light and air.

> "An easement is a liberty, privilege or advantage, without profit, which the owner of one parcel of land may have in the *lands of another.*" (14 Cyc., 1139.)

Although the phrase is a new one, a *de facto* easement well expresses an advantage without profit which the owner of one parcel of land may in fact, although without legal right, enjoy in the lands of another, such an user, for instance, as might by prescription ripen into an easement.

But to say that one can have a *de facto* easement in one parcel of his land, such as will pass under a deed conveying another parcel, "together with all easements, privileges and advantages thereto appertaining," is not only to create a new doctrine, but one opposed to every precedent, English and American, and to give an entirely new meaning to a technical legal term.

It is true that one may, as an ordinary incident of his ownership of land, make continuous use of a way, for instance, from his manor to the highway, and some writers speak of this as a quasi-easement. (14 Cyc., 1166.)

And it is conceded to be the well-settled law that, in such case, if the owner of the manor conveys it to another, that other acquires an easement *ex necessitate;* a *way of necessity* is created, and the purchaser acquires this easement, *not by the terms of his grant,* not even if the words

"easement appertaining thereto" are used, but he acquires his easement by *implication of law.* The law is well settled that where one is the owner of two tenements, the one dominant with respect to certain servitudes upon the other, and he sells the dominant tenement, the purchaser acquires the easements to which those *apparent and necessary servitudes* correspond.

The point we are now trying to impress upon this Court is, that howsoever correct the Court below may have been in its decision that the appellees acquired an easement for light and air over the adjoining land, they acquired it, if at all, by *implication of law,* and not because Haller had a *de facto* easement in his own land which could have passed under any language in his deeds to Warner & Wine or to Grayson and Heald, or was, in either case, intended so to pass.

What is there in the record to show that Haller or the appellees, or anybody else, conceived that Haller had a de facto easement in the adjoining ground, which he tried expressly to convey to the appellees under this language in his deed?

"The physical situation of the two properties," says the Court below.

This certainly involves a *petitio principii.*

Even the English cases have never gone so far as to give a man an easement by implication in his own land, and then to give it to his grantee under a presumed intention on the part of the grantor that it should pass without appropriate language in his deed, or independently of grant. The English doctrine is that the grantor intended to give as a *new-born* easement certain rights or privileges necessary to the part conveyed, but which he previously had enjoyed by virtue of his common ownership.

This case cannot, then, be decided on the theory that

Haller had a *de facto* easement in his own land which the parties regarded as a pre-existent easement, a thing apart and independent of his ownership of the adjoining ground, and that he intended this supposed pre-existent easement to pass under the language in his deed to Grayson and Heald.

It is true that the language is very broad, and although the description of the corpus of the property by *metes* and *bounds* in this deed of trust, made *after* the Flats were erected, is identical with that used in the deed of trust to Warner & Wine, which was executed *before* any improvements were made, or *de facto* easements created, yet, if in view of the changed situation since the Warner & Wine trust was given, Haller had gone out of his way to use this broad language, of which the Court below in its opinion says,

> "the deed of trust to Grayson & Heald, by express terms, not only recognizes the existence *de facto*, but the user of easements of ways, rights and privileges as appurtenant to the said building.
>
> "This is the clear import of the deed of trust" (Opinion, Record, p. 150),

then we think the Court below would have been quite justified in holding that the easements in question were intended to pass under the *express terms* of the deed of grant.

That no intention to pass any *de facto* easement ever entered into the head of the grantor, who, by the way, did not prepare the deed of trust, is shown conclusively by the following stipulation of counsel (Record, p. 174):

> "It is hereby stipulated, by and between the counsel for Warner & Wine *et al.*, appellants, and Grayson

et al., appellees, that the following language, to wit, 'together with all and singular the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in anywise appertaining, and all the estate, right, title, interest, and claim, either at law or in equity, or otherwise, however, of the parties of the first part, of, in, to, or out of the said land and premises, to have and to hold the said land, premises and appurtenances unto and to the only use of the parties of the second part, the survivors of them, his heirs and assigns,' *is used in the deed from Nicholas T. Haller to Brainard H. Warner and Louis D. Wine, trustees, referred to in the original bill in said causes, as recorded Liber No.* 2180, *at folio No.* 340 *of the land records of the District of Columbia.*

"And it is further agreed that the stipulation may be used at any future hearing in this cause, in lieu of a copy of said deed."

In concluding this point, therefore, it appears—

(a.) There was not at the time of the Grayson & Heald trust any *de facto* or *de jure* easement belonging to Haller in his own land, or anything that would answer the description in the deed of trust of "easements."

(b.) Certainly neither grantor or grantees had any *de facto* easements whatever in contemplation, or Haller would not have used the identical language (probably a printed form) in his deed to Warner & Wine when the land was unimproved.

(c.) There is absolutely no evidence in the record of any fraud or mistake which would entitle the appellees to a reformation of their deed of trust.

This may perhaps be a hardship upon the appellees, although it is one due primarily to their own negligence, but "hard cases make bad law," and we submit that the Court below erred in its answer to this question.

The notice these appellants, who purchased from Haller, had, was the same notice of the physical situation that Grayson & Heald had. Not themselves being creditors of Grayson & Heald, their legal titles should be weighed and the better prevail, otherwise the hardship is on the vigilant purchaser, whose rights are entitled to quite as much consideration as a negligent incumbrancer.

Point III.

In this District can one acquire an easement for light and air by implication?

It is conceded that the English rule is in favor of extending to easements for *light* and *air* the same doctrine of implied grant that prevails universally with respect to other easements, such as ways of necessity, etc. It is also true that in England, and in one or two of our States, easements for light and air, as well as other kinds of easements, may be acquired by prescription, *i. e.,* the peculiarly English doctrine of ancient lights.

It only remains to be seen whether, in adopting our common law from England, so much at least of it as was applicable to a young and growing country, we adopted the English law of easements as a *whole,* or whether the doctrine that easements for *light* and *air* could be acquired otherwise than by express grant, *i. e.,* by prescription on the one hand, or by implication on the other, has not been advisedly repudiated in every State in this country except, possibly, Maryland.

In the United States the English doctrine of implied easements of *light and air* is repudiated.

According to the English authority, it seems that if

one sell a house the light *necessary* for the reasonable enjoyment whereof is derived from and across adjoining land then belonging to the same owner, the easement of light and air over such vacant lot would pass as incident to the dwelling house, *because necessary to the enjoyment thereof,* but that the law would not carry the doctrine to the securing of such easement as a mere convenience to the granted premises.

See Leech *vs.* Schroeder, L. R., 9 Ch. App., 463.

This doctrine was recognized in certain *dicta* in some of the earlier decisions in this country, but has been recognized when the direct question was before the court in but three cases; these exceptions to the general rule prevailing in this country are found in the decisions of Maryland and New Jersey. (Louisiana not being here considered, the law of that State being based on the Civil Law, not the English Common Law.)

Curiously enough Maryland, which in 1857 peremptorily repudiated the idea that an easement for *light* and *air* could be acquired in that State by *prescription,* on the ground that the English doctrine, when applied to light and air, was entirely unsuited to the needs of a young and growing country (see Cherry *vs.* Stein, 11 Md., 1), held in 1870, in Janes *vs.* Jenkins (34 Md., 1), that such an easement could be acquired by implication of law under certain circumstances. The equal unsuitability to our needs of easements for light and air by implication of law, based on *apparent necessity,* on the one hand, and on continuous, open, notorious and adverse user for the prescriptive period on the other, seems to have been ignored by the learned Judge, Mr. Justice Alvey, who decided Janes *vs.* Jenkins while on the Maryland bench. Again, after refusing, in Cherry *vs.* Stein,

to follow the English cases, the Maryland Court of Appeals, in Janes *vs.* Jenkins, places its chief reliance upon them.

Only two American decisions were cited:

United States *vs.* Appleton, 1 Sumn., 492 (1833).
Lampman *vs.* Milks, 21 N. Y., 505 (1860).

These cases did not themselves involve the doctrine of implied easements for *light* and *air*, and the portion of the opinions referring to light and air were dicta, pure and simple, and dicta, moreover, expressly overruled in the first two cases in their respective States in which such easements were contended for.

It is thus seen that Janes *vs.* Jenkins stands without American support.

It is of value, however, in that the learned Judge who decided Janes *vs.* Jenkins in Maryland foreshadowed therein the theory of *de facto* easements which we afterwards find developed fully in the opinion of the District of Columbia Court of Appeals in the case at bar.

In New Jersey the implied right to light and air over land retained by the grantor was sustained in the cases of—

Sutphen *vs.* Therkelson, 38 N. J. Eq., 318, 1884; and
Greer *vs.* Van Meter, N. J. Eq., 33 Atl. Rep., 794, 1896.

These decisions seem to be based upon the adoption in this State in 1776 of the English common law. The cases cited in support of them were English cases and certain decisions of the New Jersey courts, the latter, however, relating to easements other than those of light

and air. These cases are, therefore, also without American authority and support.

These three cases, therefore, stand as distinctive exceptions to the general American rule that there is no implied grant of light and air over land retained by the grantor upon the severance of an estate.

The early decisions and *dicta* in other States favoring the doctrine of implied easements in light and air over the grantor's other land have been decidedly overruled by later decisions. In fact, there appear to have been no *decisions* in other States in full support of the doctrine, certain other elements being involved in the cases which seem to support the doctrine and upon which rights recognized were more or less dependent.

The following decisions are of this nature, certain *dicta* therein sustaining the doctrine of an implied grant of light and air over the grantor's remaining land, but as the question was not involved or necessary in any of these cases the decisions are of no authority upon the subject:

White *vs.* Bradley, 66 Me., 254, 1876.
Cherry *vs.* Stein, 11 Md., 1, 1857.
Story *vs.* Odin, 12 Mass., 157, 1815.
Thurston *vs.* Hancock, 12 Mass., 220.
Grant *vs.* Chase, 17 Mass., 443, 1821.
United States *vs.* Appleton, 1 Sumn. 492, 1833.
Lampman *vs.* Milks, 21 N. Y., 505, 1860.
Havens *vs.* Klein, 49 How. Prac., 95, 1875.
Maynard *vs.* Esher, 17 Pa. St., 222, 1851.

By carefully noting the distinction between the decision and dicta, it will be observed that the doctrine of an implied right to light and air has had but the slightest recognition in the past, while all the latest and best considered cases are opposed to the doctrine.

In a few cases it has been held that the grant of an easement of light and air over the grantor's other land may be implied if the easement is a real necessity to the reasonable enjoyment of the building granted. But a careful examination of the cases supporting this view discloses the fact that in each one it was found that no necessity existed in that case, so the statements of an implication of the right to the use of light and air arising from necessity exists as mere *dicta*, and are, therefore, of no consequence in establishing such doctrine. See the following cases:

Robinson *vs.* Clapp, 65 Conn. 365, 32 Atl. Rep., 939, 1895.
Turner *vs.* Thompson, 58 Ga. 268, 24 Am. Rep., 497, 1877.
Morrison *vs.* Marquardt, 24 Iowa 35, 92 Am. Dec., 444, 1868.
Colier *vs.* Pierce, 73 Mass. 7 Gray, 18, 1856.
Rennyson's Appeal, 94 Pa. St. 147, 1880.
Powell *vs.* Sims, 5 W. Va. 1, 13 Am. Rep., 629, 1871.

This doctrine of implication from necessity seems, therefore, to have existed in this country as a theory in the minds of some judges rather than as a rule of law.

It may be stated, therefore, as in accordance with the principles applied to our developing and improving country, and with the leading decisions in the most recent and carefully considered cases, that there is no implied grant of the right to light and air over the grantor's other land adjoining the land conveyed.

The following decisions fully sustain this position:

California—1898, Kennedy *vs.* Burnap, 52 Pac. Rep., 843.
District of Columbia—1903, Hutchins *vs.* Munn, 22 D. C. App. 88.

Indiana—1875, Keiper *vs.* Klein, 51 Ind. 316.
Massachusetts—1872, Randall *vs.* Sanderson, 111 Mass. 114.
Massachusetts—1874, Keats *vs.* Hugo, 115 Mass., 204.
New York—1849, Palmer *vs.* Wetmore, 2 Sandf., 316.
New York—1851, Meyers *vs.* Gemmel, 10 Barb., 537.
New York—1877, Shipman *vs.* Beers, 2 Abb. N. C., 435.
Ohio—1869, Mullen *vs.* Stricker, 19 Ohio St. 135, 2 Am. Rep., 379.
Pennsylvania—1859, Haverstick *vs.* Sipe, 33 Pa. St., 378.

The six decisions cited, page 26, of this brief, so far as the cases under consideration and decided extend, also sustain this position though qualified by what was mere *dicta*.

The doctrine of an implied grant of an easement over the land retained by the grantor rests upon the maxim that a grantor cannot be allowed to derogate from his own grant, and that he is presumed to convey with the land granted whatever rights are necessary for the reasonable enjoyment of the thing conveyed, so far as the grantor has such rights in his possession.

The reasons against applying such doctrine to a right to light and air are well stated in the following decisions:

Bronson, *J.*, in delivering the opinion of the court, in the case of Parker *vs.* Foote (19 Wend., 309, 1838), said:

> "In the cases relating to *ways, commons, markets, watercourses* and the like, where the user or enjoinment, if not rightful, has been an immediate and con-

tinuing injury to the person against whom the prescription is made. His property has either been invaded or his beneficial interest in it has been rendered less valuable. The injury has been of such a character that he might have immediate redress by action. But in case of *windows* overlooking the land of another, the injury, if any, is merely ideal or imaginary. The light and air which they admit are not the subjects of property beyond the moment of actual occupancy."

Biddle, *J.*, in delivering the opinion of the court, in the case of Stein *vs.* Hauck (56 Ind., 65, 1877), said:

"An easement in light and air is unlike any other easement known to the law. It is neither an *appurtenance* nor a hereditament. No definition of property known to the law includes it specifically. No exclusive right can be had in the light or air; legislation cannot create such a right, because man has no exclusive domination over them. They are for all in common. To give a right of property in light or air, which can control the right to the use of land, is to make the incident greater than the principal, and allow the shadow to control the substance."

The reasons against implied rights to light and air are well stated by Chief Justice Gray, in the case of Keats *vs.* Hugo (115 Mass., 204, 215, 15 Am. Rep., 80, 1874), as follows:

"By nature, air and light do not flow in definite channels, but are universally diffused. The supposed necessity for their passage in a particular line or direction to any lot of land is created, not by the relative situation of that lot to the surround-lands, but by the manner in which that lot has been built upon. The actual enjoyment of the air and light by the owner of the house is upon his own land only. He makes no tangible or visible use of the adjoining lands, nor, indeed, any use of them which can be made the sub-

ject of an action by their owner, or which in any way interferes with the latter's enjoyment of the light and air upon his own lands, or with any use of those lands in their existing condition. In short, the owner of the adjoining lands has submitted to nothing which actually encroaches upon his rights, and cannot, therefore, be presumed to have assented to any such encroachment. *The use and enjoyment of the adjoining lands are certainly no more subordinate to those of the house where both are owned* by one man than where the owners are different. * * *

"The reasons upon which it has been held that no grant of a right to light and air can be implied from any length of continuous enjoyment are equally strong against implying a grant of such a right from the mere conveyance of a house with windows overlooking the land of the grantor. To imply the grant of such a right in either case, without express words, would greatly embarrass the improvement of estates, and, by reason of the very indefinite character of the right asserted, promote litigation. The simplest rule, and that best suited to a country like ours, in which changes are continually taking place in the ownership and the use of lands, is that no right of this character can be acquired without express grant of an interest in, or covenant relating to, the lands over which the right is claimed."

Chief Justice Dillon, in the case of Morrison *vs.* Marquardt (24 Iowa, 35, 60; 92 Am. Dec., 444, 1868), said:

"As to light and air, I am free to say that I do not believe the rule, as applied to our situation and circumstances, a sound one, which holds that under any circumstances this right can, by implication, be burdened upon an adjoining estate, so as to prevent the owner thereof from building upon or improving it as he pleases.

"Surely, such an easement, uncertain in its extent and duration, without any written or record evidence of its existence, fettering estates and laying an em-

bargo upon the hand of improvement which carries the trowel and the plane, and, as applied to a subsequent purchaser, against the spirit of our recording acts, and not demanded by any consideration of public policy—surely, such an easement should not be held to exist by mere implication, when such implication originates in no reasonable necessity."

Welch, *J.*, in delivering the opinion of the court, in the case of Mullen *vs.* Stricker (19 Ohio St., 135; 2 Am. Rep., 379, 1869), said:

"What we hold is, that the law of implied grants and implied reservations, based upon necessity or use alone, should not be applied to easements for light and air over the premises of another in any case.

"In our view, therefore, the law of the present case is not in the least varied by the fact that the dominant estate was conveyed first, or by the fact that both lots were sold at the same time. It seems to us that this doctrine of easements in light and air, founded upon sheer necessity and convenience, like the kindred doctrine of 'ancient windows,' or prescriptive right to light and air by long user, is wholly unsuited to our condition, and is not in accordance with the common understanding of the community.

"Both doctrines are based upon similar reasons and considerations, and both should stand or fall together. They are unsuited to a country like ours, where real estate is constantly and rapidly appreciating and being subjected to new and more costly forms of improvement, and where it so frequently changes owners as almost to become a matter of merchandise. In cases of cheap and temporary buildings, the application of the doctrine would be attended with great uncertainty and be a fruitful source of litigation. It would, moreover, in many cases, be a perpetual incumbrance upon the servient estate and operate as a veto upon improvements in our towns and cities. It will be safer, we think, and more likely to subserve the ends of justice and public good to leave the parties, on ques-

> tions of light and air, to the boundary lines they name and the terms they express in their deeds and contracts."

It seems to be the established policy of the law in this country that the extent of the dominion of the owner of land is within the boundaries indicated by his deed, and within this prescribed, determined, ascertained limitation, each owner has the unlimited right to build as he pleases, and no owner has any control or dominion over the land beyond his boundaries, except in the case of ways of necessity.

Is there any principle of justice for the person who purchases a certain described tract of land to claim the use of certain other ground for the benefit of a building situated thereon? Had he desired more land or the privilege of additional land to that conveyed he should have stipulated therefor in connection with his purchase or afterwards. After bargaining for so much land, can he say to the grantor, "You have granted so much, for which I have paid you; now, I demand the use of other land of yours without compensation; I demand that you make no use of a certain portion of your own land, but shall continually reserve the same for my benefit."

It is contrary to the policy of the law in this country to prevent the improvement of lands by any implied rights of adjacent owners. The principle underlying our recording acts is that rights to and dominion over land is to be determined from that which is expressly granted, that which is expressed in the deed and recorded in the land records, and that the full extent of the right to or interest in lands can be determined from such records, with nothing left to implication. When the records show that the ownership of a certain defined tract of land is in a certain person, he, himself, or whoever acquires his title, is not to be hindered or prevented

from improving the same to its full extent by some implied right or claim. The record must be controlling and all rights or interest in land must rest upon express contract. This is in accordance with the spirit of our institutions and has been adopted as a part of the common law of this country as fully as the doctrine of implied rights has been in England.

"Notice" as to rights in lands, in this country, means that recorded notice which is placed on the public records that all may be aware from what is expressed, the extent and limitation of rights and interests in lands.

The principle that the records govern, not from the date of transactions, but from the time of entering for record, implies that the public record is the basis for determining the rights and interest in lands, and is contrary or opposed to any rights arising or resulting from implication.

It may, therefore, be safely asserted that the law of this country, according to the latest and best considered decisions, is that an easement of light and air can exist only by express contract or agreement, and never by implication.

Such, also, was the rule recognized in this District until the decision of the case at bar.

In the case of Hutchins *vs.* Munn, decided by the Court below, May 6th, 1903 (*22* App. D. C., p. 88), the Court, at page 101, uses this language:

> "It would seem that by the weight of American authority one who erects a house upon a lot belonging to him, with windows overlooking an adjoining vacant lot and receiving light and air across the same, and then conveys to another, is not thereby precluded from building on the adjoining lot, whether before owned or subsequently acquired, in such way as to intercept the passage of air and light through said windows.

> Keats *vs.* Hugo, 115 Mass., 204; 15 Am. Rep., 80; Cherry *vs.* Stein, 11 Md., 1, 24; 19 Am. and Eng. Ency. Law, p. 115. The foregoing doctrine is not, however, involved in this case, and is referred to merely by way of illustration."

Also on the same page of the opinion (p. 101) the Court says:

> "The authorities in this country are practically unanimous in holding that no easement can be thus (by prescription) acquired. 19 Am. and Eng. Ency. Law, p. 118."

Our lower Court itself, therefore, had joined in the general repudiation of the English doctrine that easements for light and air could be acquired by *implication* or by prescription, or in any other way than by express grant.

To give the appellees in the case at bar an easement for light and air, the Court was, therefore, obliged to invoke the novel theory of *de facto* easements.

That theory has been fully criticised under *Point II.* of this brief, and the inaptness of the language used in the deed of December, 1897, and the other circumstances (to wit, the use of the same language in the Warner & Wine trust), negativing any such intention, have been clearly shown.

In conclusion, it must not be overlooked that the law favors the alienation of real as well as personal property; that the recording acts, coupled with the Statute of Frauds, have made it as easy and safe to buy and sell real estate as any other commodity; that large transactions take place through agents in cases where the purchaser never inspects his purchase, relying upon location and general description for values and title companies for titles. Establish here, then, this doctrine of *de*

facto easements, or easements of *light* and *air* by *implication*, and no one is safe in purchasing without an inspection of his purchase, and without looking into the history of every adjoining parcel of land or house, within the light and air radius, to make sure there are no *de facto* easements lurking in the background.

Point IV.

Does the case of Shepherd *vs.* Pepper (133 U. S., 626) justify the decree in this case?

The learned Court below says, in its opinion (Record, p. 150):

> "This case would seem to be clearly within the principle of the decision of the Supreme Court of the United States, in the case of Shepherd *vs.* Pepper, 133 U. S., 626, 650."

This must clearly refer to the overhanging roof, and not to the easement for light and air, because, as the Court says—

> "The improvements and easements in question were visibly necessary for the dwelling house as then constructed, and were visibly upon, or required for the use of Sub. lot A."
> (Record, p. 152.)

The improvements referred to were of a tangible kind consisting, in fact, of part of a *dwelling house*.

The doctrine of implied easements for other things than *light* and *air* was recognized by the Court below in

> Frizzell *vs.* Murphy, 19 App. D. C., 440.

The Court below could not, therefore, have cited either Shepherd *vs.* Pepper or Frizzel *vs.* Murphy as

authority for the proposition that an easement for light and air could be acquired in this District by implication of law; that is to say, because apparently necessary to the enjoyment of the land granted.

The language used in Hutchins *vs.* Munn completely negatives any such suggestion.

Shepherd *vs.* Pepper was evidently intended as authority for so much of the decree as dealt with the overhanging eaves of the Flats and for the method hit upon for having the property sold as a whole. This case was relied upon by Justice Hagner, who originally decided it in the lower Court, not as authority for annexing an easement for light and air, but for giving to the appellees the *corpus* of the adjoining land, and the Court of Appeals reversed him in the present case for following Shepherd *vs.* Pepper so literally.

And yet if Shepherd *vs.* Pepper is in point at all, it was the land itself, and not a mere easement for light and air, to which appellees are entitled.

The controlling consideration upon which the case of Shepherd *vs.* Pepper, which granted, not an easement, but part of a *dwelling house,* was decided, was one totally lacking in the case at bar, as the record will show, and as the Court of Appeals must have found in order to justify its reversal of the lower Court in the case at bar.

Shepherd vs. Pepper was an ordinary case for the reformation of a deed on the ground of mutual mistake, and had nothing to do with easements by implication.

We quote the opinion of this Court in the Shepherd case, delivered by Mr. Justice Blatchford:

> "Shepherd put in an answer to the bill, on the 1st of June, 1882, denying that the bill filed by him was dismissed for want of jurisdiction; denying that the omission of sub-lot 'A' from the first two deeds of trust was an accident or a fraud on his part or on

that of the agent; and denying that Pepper has the right to have the deeds corrected so as to include sub-lot 'A'; but admitting that he (Shepherd) executed the first two deeds of trust in the belief that the whole property covered by the house was embraced in them." (133 U. S., page 640.)

It was the intention of both Pepper and Shepherd that the whole of this property should be included in the deeds of trust. (133 U. S., page 645.)

"When the first bill was filed by Pepper he knew that Shepherd had merely a tax title to sub-lot 'A'; and Shepherd, in his answer to that bill, averred that title to sub-lot 'A' never belonged to him, and that he therefore purchased what is called a tax title to sub-lot 'A,' but it turned out to be void and of no effect. Therefore, Pepper could not at that time have attempted to reform the first two deeds of trust so as to include sub-lot 'A,' because Shepherd then had no title to that sub-lot. But the fact that both Pepper and Shepherd agree that it was intended by them that the first two deeds of trust include sub-lot 'A,' gave Pepper a right to assert an equitable mortgage against that sub-lot; so that afterwards, when Shepherd bought in the proprietary title to it, as the evidence showed he did, Pepper was for the first time in a position to insert a lien against it." (133 U. S., page 648.) * * * "We think that Pepper is entitled to have the whole of lot '3' sold. It was omitted at least by accident from the first two deeds, when both parties supposed they covered it. * * * (133 U. S., page 650.)

"In regard to Mrs. Gray, the letter to her, written by Mr. Brown, of the firm of Fitch, Fox & Brown, who were negotiating for her the loan to Shepherd, the letter being dated April 18, 1873, speaks of the loan as one 'to be secured by a second mortgage, the prior mortgage being for $45,000.' * * * (From the same page.) "Mrs. Gray is only a mortgagee, and not the owner in fee of sub-lot 'A'; and her inter-

> est in the property is subject to the prior and subsequent interests of other parties, as those interests are usually ascertained and administered by a court in equity for the benefit of all concerned."

It appears from the foregoing extract from the opinion of the Supreme Court that there was a plain, clear case for the reformation of Pepper's deed, on the ground of mutual mistake on the part of the parties, and that Mrs. Gray had full notice of the mistake, and purchased with the belief that the trust to Pepper covered all of the ground included in her trust. She could not, therefore, have been misled as to the nature of her securities. The only question really involved, so far as the owner of the ground was concerned, was whether or not, admitting that Pepper once had a clear equity for the reformation of his deed, on the ground of mistake, he had not forfeited it, by his *laches*.

In the face of these facts found by this Court, the emphasis laid by the Court below upon one sentence of Mr. Justice Blatchford's opinion (see italics, Record, p. 152) was certainly not justified by the facts of the case or the context of the opinion.

The record in this case at bar shows that no mistake or fraud whatever existed in the minds of the appellees or was perpetrated upon them by Haller, their grantor. The opinion of Judge Hagner in the Equity Court (Record, p. 141) finds that Haller was neither "stupid" in making a mistake as to what he intended to convey, nor guilty of any "fraud" as to the appellees. Indeed, Judge Hagner, who was not a little severe upon the appellants for their actions, *after* the deed to Grayson and Heald was made and delivered, expressly "*acquits*" Haller of any participation in either fraud or mistake

(opinion of Judge Hagner, Record, p. 141) *at the time* of its execution and delivery.

The keynote of the whole situation appears to have been the negligence of the appellees in securing less land than they *afterwards* discovered they wanted.

> "A little more intelligent appreciation of the situation at the time of the parties interested would have resulted in carrying into effect the plan to release the strip and have avoided all the vexatious litigation." (Opinion, Record, p. 141.)

That Judge Hagner was mistaken in thinking that any plan ever existed to attach the ten-foot strip to the Grayson and Heald trust is immediately evident from an inspection of Exhibit No. 5 (Record, p. 112), from which it appears that *several months after* the deed of trust to Grayson and Heald, Haller tried to negotiate a release of 10 feet to enable him to sell out to a stock company (Record, p. 120). The negotiation fell through. The Judge of the Equity Court was right, however, in finding that the appellees' troubles might have been avoided by the exercise of some care or intelligence on their parts.

When the appelees loaned their money, there stood the building, with its alleged dependence for light and air upon the south and west, and the extreme likelihood of the adjoining property passing out of Haller's hands, as it was already heavily mortgaged, and they well knew that Haller was insolvent and utterly incapable of protecting the adjoining property from sale. Yet without having the title examined, without making any effort to discover what the real location of the building was, they gave up their statutory lien upon the buliding, thinking to further advantage themselves by accepting a deed of trust. It is true that in answer to the following leading

question: "At the time of taking this second trust, what knowledge, if any, had you that the Victoria Flats building was not fully comprised within the ground specified in that deed?" Mr. Grayson answered, "None whatever; I never had any suspicion or any intimation otherwise," and his understanding and belief was that the entire ground belonged to Mr. Haller, and he did not know anything about the dimensions of the building at all (see Dep. of Grayson). He does not say he was deceived in any particular by Mr. Haller or the appellants or prevented from ascertaining what security he was to receive, but apparently at that time considered the matter of no importance.

This negligence completely deprives the complainants of any standing in a Court of Equity for relief, whether by way of reformation of their deeds or otherwise.

> "Equity will not extend its aid to relieve a mistaken party who has been guilty of culpable negligence. Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence which may be fairly expected from a reasonable person." Grimes *vs.* Sanders, 93 U. S., 55; Connor *vs.* Welsh, 51 Wis., 431, where it was said:
>
> "It is infinitely better that men should be held to consequences of their own culpable carelessness than that courts of equity should undertake to relieve therefrom. The rule requires reasonable caution and prudence in the transaction of business, and is deeply imbedded in our jurisprudence. It is within the principle of reason of *caveat emptor*. The abrogation of the rule would tend to encourage negligence, and to introduce uncertainty and confusion in all business transactions."

Point IV.

Does Shepherd *vs.* Pepper justify the decree that the property may be sold as an entirety?

The modified decree of November 30th, 1903 (Record, p. 165) provides for the sale by the trustees of all the property, the Flats and the adjoining lands, as a *whole*, "if they shall find it expedient and advantageous so to do."

As the real contention is between the legal owners of the adjoining land on the one hand, who would be entitled if it were separately sold to the surplus, if any, after a $12,000 trust is satisfied, and on the other hand encumbrances to the extent of $120,000, what the trustees will find it "expedient and advantageous to do," can be easily guessed when it is remembered that these trustees were selected over the protest of the appellants from *Haller's creditors* exclusively.

The decree, even if the appellees were entitled to an easement for light and air, is manifestly unjust. Instead of definitely adjudicating the rights of the parties, it arbitrarily commingles parcels of property in which there are manifold conflicting interests and makes it possible and practically certain that these various properties will be offered for sale in one large parcel, under such circumstances as to practically exclude Wood and Talbott from any opportunity to protect themselves by becoming bidders at the sale.

The answer made by the Court below to all of these objections is the supposed authority for such a proceeding found in Shepherd *vs.* Pepper (*supra*).

We have already tried to point out one striking difference between that case and this, by which, in spite of very many similarities in unimportant details, it is en-

tirely without value as a precedent for decreeing an easement for light and air by mere implication of law, so also the method of sale proper in that case is wholly improper here.

There the controversy was wholly between a number of *creditors of Shepherd,* and Shepherd himself. The debts secured upon the several portions of Shepherd's land were Shepherd's debts. Only in case the *entire* property brought more than the *sum total* of the debts secured upon it, was Shepherd entitled to anything. If he had been at the sale he could have bid in none of the property that would not at once have belonged to his creditors and been an indirect way of paying his debts. The objections came from one incumbrancer who wished to secure an improper advantage over another.

> "We think that Pepper is entitled to have the whole of Lot 3 sold. It was omitted at least by *accident* from the first two deeds, when both parties *supposed they covered it.* * * * (Shepherd *vs.* Pepper, 133 U. S., p. 650.)
>
> "In regard to Mrs. Gray, the letter to her, written to her by Mrs. Brown, of the firm of Fitch, Fox & Brown, who were negotiating for her the loan to Shepherd, the letter being dated April 18, 1873, speaks of the loan as one 'to be secured by a second mortgage, the *prior mortgage* being for $45,000.' * * * Mrs. Gray is only a mortgagee, and not the owner in fee of sub-lot A; and her interest in the property is subject to the prior and subsequent interests of other parties, as those interests are usually ascertained and administered by a Court in Equity for the benefit of all concerned."

A simple case of marshalling Shepherd's assets to pay Shepherd's debts.

In the case at bar Wood's assets and Talbott's assets are to be marshalled to pay Haller's debts.

Wood and Talbott purchased two distinct pieces of property, each subject to a deed of trust to secure a debt due from Haller. They are now required to bid $132,000 to protect their equity of redemption in their second purchase, encumbered by a deed of trust for $12,000.00.

It is respectfully submitted that the most the appellees are entitled to, as against these appellants, is to have the property described in their trust, together with the building in its *entirety* so'd as one piece. By its entirety is meant, with its overhanging eaves and its walls one inch over the line. In spite of all contrary assertions there is no evidence that the wooden porches and cement walk are anything more than merely a *convenience* to the premises. The appellants are certainly entitled to have the adjoining ground sold subject only to the $12,000 trust upon it.

Respectfully submitted,

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